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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

EDMUNDO BUSTAMANTE et al.,

Plaintiffs and Appellants,

v.

T.O. IX, LLC et al.,

Defendants and Respondents.

2d Civil No. B241233  
(Super. Ct. No. 56-2008-00317003-  
CU-FR-SIM)  
(Ventura County)

Plaintiffs Edmundo Bustamante and Tiffany Bustamante appeal attorney fee and costs awards following a judgment for defendants in their damage action involving their purchase of a home. They alleged alter ego liability theories and sued defendants T.O. IX, LLC; Stephen Bock; D and S Homes, Inc.; D & S Development, LLC; DRD Enterprises, LLC; Darin Davis; Emaron Homes, LLC; Fairland Construction, Inc; Jose F. Leon, trustee of The Leon Family Trust; Jose F. Leon; Regina Leon; Real Estate Spectrum, Inc.; Regina Leon, trustee of The Leon Family Trust; Skyphol California, LLC; Skyphol Delaware, LLC; and The Leon Family Trust.

We conclude, among other things, that: 1) the Bustamantes signed a real estate purchase contract that contains an attorney fee provision, 2) they have not shown that the referee abused his discretion in awarding attorney fees, but 3) the award of

\$80,758.75 in costs was error because the defendants did not file a memorandum of costs. We strike the cost award, but affirm the attorney fee award.

### FACTS

The Bustamantes sued the defendants for damages relating to their purchase of a home from T.O. IX. They alleged they discovered that T.O. IX built their home without having a contractor's license. They claimed they would not have bought it if they had known that fact.

The superior court ordered the case to be tried by a judicial referee. The defendants prevailed after a lengthy trial. The Bustamantes appealed, and we affirmed the judgment.

The defendants filed a motion for attorney fees and costs. The referee granted that motion. He awarded attorney fees for the work performed by four law firms who represented the defendants as follows: \$230,930.81 to Chassman & Selig; \$182,462.16 to Cox, Castle & Nicholson; \$107,740.00 to the Hendricks Law Firm; and \$497,880.62 to the Semper Law Group. He also awarded costs to the defendants in the amount of \$80,758.75.

### DISCUSSION

#### *Construction Contract or Real Estate Purchase Agreement?*

The Bustamantes contend: 1) they signed a construction contract with defendant T.O. IX; 2) T.O. IX was not a licensed contractor; 3) it was therefore an illegal contract; and 4) consequently, the referee could not award attorney fees or any other any relief against them.

Respondents claim the Bustamantes are barred from relitigating these issues because in a prior appeal in this case we rejected these claims. They are correct.

In *Bustamante v. T.O. IX* (July 10, 2012, B237167), a nonpublished opinion, we said, “The ‘common-law rule that illegal contracts will not be enforced’ relates to actions brought by unlicensed contractors “for collection of compensation” for contracting work.” (McCarroll v. Los Angeles County Dist. Council of Carpenters

(1957) 49 Cal.2d 45, 69.) “The instant action is not such a case. T.O. IX did not bring an action to collect construction fees.” (*Bustamante, supra*, B237167.) We concluded the Bustamantes signed a real estate purchase contract, not a contract for construction services. (*Ibid.*) Under the law of the case doctrine, our decision in the prior appeal bars the Bustamantes from relitigating these issues. (*City of Santa Paula v. Narula* (2003) 114 Cal.App.4th 485, 491-492.)

The “Joint Purchase Agreement” the Bustamantes signed provides, “In any action, proceeding or arbitration between Buyer and Seller arising out of this agreement, the prevailing party shall be entitled to reasonable attorney’s fees and costs.” The Bustamantes did not prevail. The referee had authority to award attorney fees.

*Abuse of Discretion in Awarding Attorney Fees?*

The Bustamantes claim the referee erred in awarding attorney fees because the defendants’ counsel redacted some of their billing statements in support of their motion for attorney fees. They claim the redacted portions “made the information too vague to support an award” of fees.

Respondents note that their counsel redacted some portions of the billing statements “to preserve attorney work product and attorney client privileges.” But the referee required them to submit the “un-redacted billings” to be reviewed “*in camera*.” They suggest that because the referee reviewed the unredacted billing records primarily for the Bustamantes’ benefit, the Bustamantes’ claims of error or unfairness should be rejected.

The Bustamantes contend the record does not reflect that the referee reviewed those unredacted records. We disagree. In his February 5, 2012 order, the referee said, “If Defendants want me to consider these billings, then they must submit to me un-redacted billings which I can review *in camera*.” In the May 7, 2012 “final award,” the referee said: 1) the attorney fee matter “was ordered re-opened” by “order of the Referee dated February 5, 2012”; 2) “the Defendants were ordered to submit further evidence supporting their claimed attorney fees”; and 3) the referee “read and

considered” the “evidence” before ruling on the attorney fee motion. The reference to “evidence” refers to the “un-redacted billings” mentioned in the February 5th order. In that order, the only additional evidence the referee authorized the Respondents to submit was the un-redacted billings.

The Bustamantes have not challenged the respondents’ reasons for redacting or their confidentiality claims. (*Babcock v. Superior Court* (1994) 29 Cal.App.4th 721, 728 [confidential records may be reviewed in camera].) Nor have they presented a complete record on appeal. They did not request the unredacted records to be sealed and delivered for an in camera review on this appeal. The referee said he considered issues the parties raised at a March 19, 2012 hearing before ruling on the attorney fee issues. But there is no reporter’s transcript of that hearing and the Bustamantes have not presented a settled statement. Their opening brief contains no statement of facts about what evidence was admitted at that hearing. The Bustamantes have the burden to show error based on the record the trier of fact reviewed. We may not conclude the referee erred based on the incomplete record they have presented. (*Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1535-1536.)

But even on the record we have, the Bustamantes have not shown error. They claim the redacting had the effect of showing “only the hours and *not the services performed*.” (Italics added.) They point, for example, to the billing statements of attorney Sandra Stewart. But the portions of the record they cite do not support their position.

For example, the Bustamantes claim Stewart submitted a billing on April 28, 2008, which contained redacting and did not show what services she performed. But her billing entry describes the services as a “[t]eleconference with Mr. Bock.” Her billing entries for April 29, 2008, contain some redacting, but each billing entry also describes the nature of the services rendered, i.e., “review, analyze complaint regarding allegations, tender issues” and “[e]xtended teleconference with Mr. Bock.” The Bustamantes refer to her records for May 19, 2008, and May 20, 2008. Those billings

contain some redaction, but each billing contains a description of the services. For example, the May 19 billing notes “[v]arious teleconferences with Mr. Bock.” The May 20 entry states, “Review, analyze and revise objections to discovery served on Defendants . . . . Research legal requirements for moving to quash subpoenas.”

The defendants’ counsel produced extensive, detailed billing records to support the fees they requested. The referee who reviewed these records was an experienced trial judge, and he presided over the lengthy trial in this case. “‘The “experienced trial judge is the best judge of the value of professional services rendered in his court . . . .”’” (*Sommers v. Erb* (1992) 2 Cal.App.4th 1644, 1651.) An award of fees ““will not be disturbed unless the appellate court is convinced that it is clearly wrong.”” (*Ibid.*) The record reflects that in the instances where counsel redacted the billings, they also included a description of the services rendered. The referee found: 1) “the redactions in the billing records did not unreasonably burden Plaintiffs’ right to review the same,” and 2) “there is no evidence of work performed that was unrelated to this case.” The Bustamantes have not shown that these findings are unsupported by the evidence. Nor have they demonstrated that the fees awarded were excessive considering the nature and complexity of this case. There was no abuse of discretion.

#### *Costs*

The Bustamantes contend the award of \$80,758.75 in costs must be vacated because the defendants did not file a cost memorandum as required by the Rules of Court. We agree.

Respondents essentially concede that they did not file a cost memorandum. “The requirement is imposed upon the party who is entitled to costs that he file a memorandum of the items of his costs and disbursements . . . .” (*Oak Grove School Dist. v. City Title Ins. Co.* (1963) 217 Cal.App.2d 678, 697; Cal. Rules of Court, rule 3.1700.) “[I]f he fails to do so he is deemed to have waived the costs accruing in his favor.” (*Oak Grove*, at p. 697.) The Bustamantes are correct that the absence of a memorandum of costs unfairly impeded their right to file a motion to tax costs.

The cost award of \$80,758.75 is stricken. The attorney fee award is affirmed. Each party shall bear their own costs on appeal.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Burton S. Katz, Judge<sup>\*</sup>  
Superior Court County of Ventura

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Law Offices of Ray B. Bowen, Jr., Ray B. Bowen, Jr. for Plaintiffs and  
Appellants.

Semper Law Group, LLP, Leonard M. Tavera for Defendants and  
Respondents.

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<sup>\*</sup> (Retired Judge of the L.A. Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)